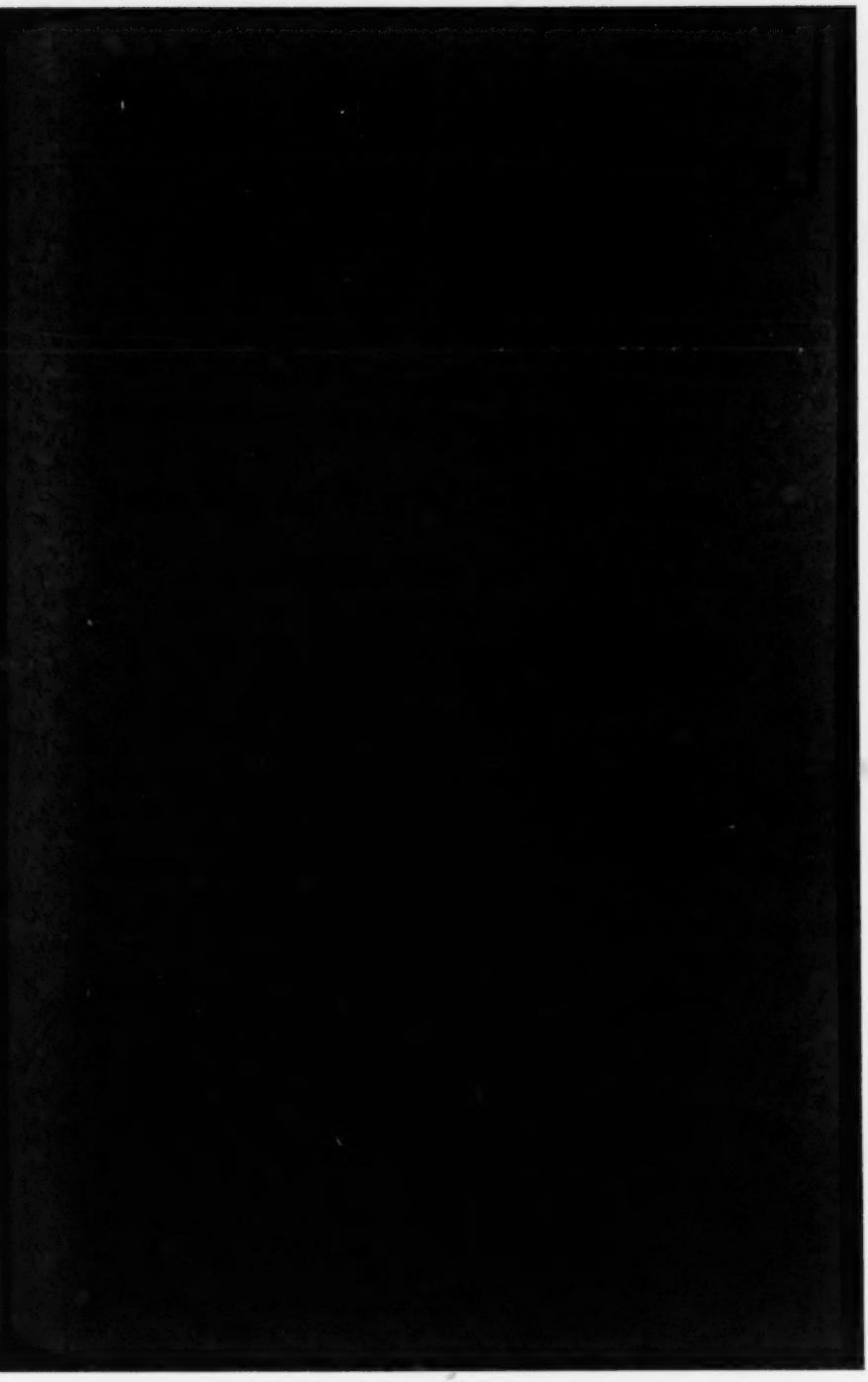

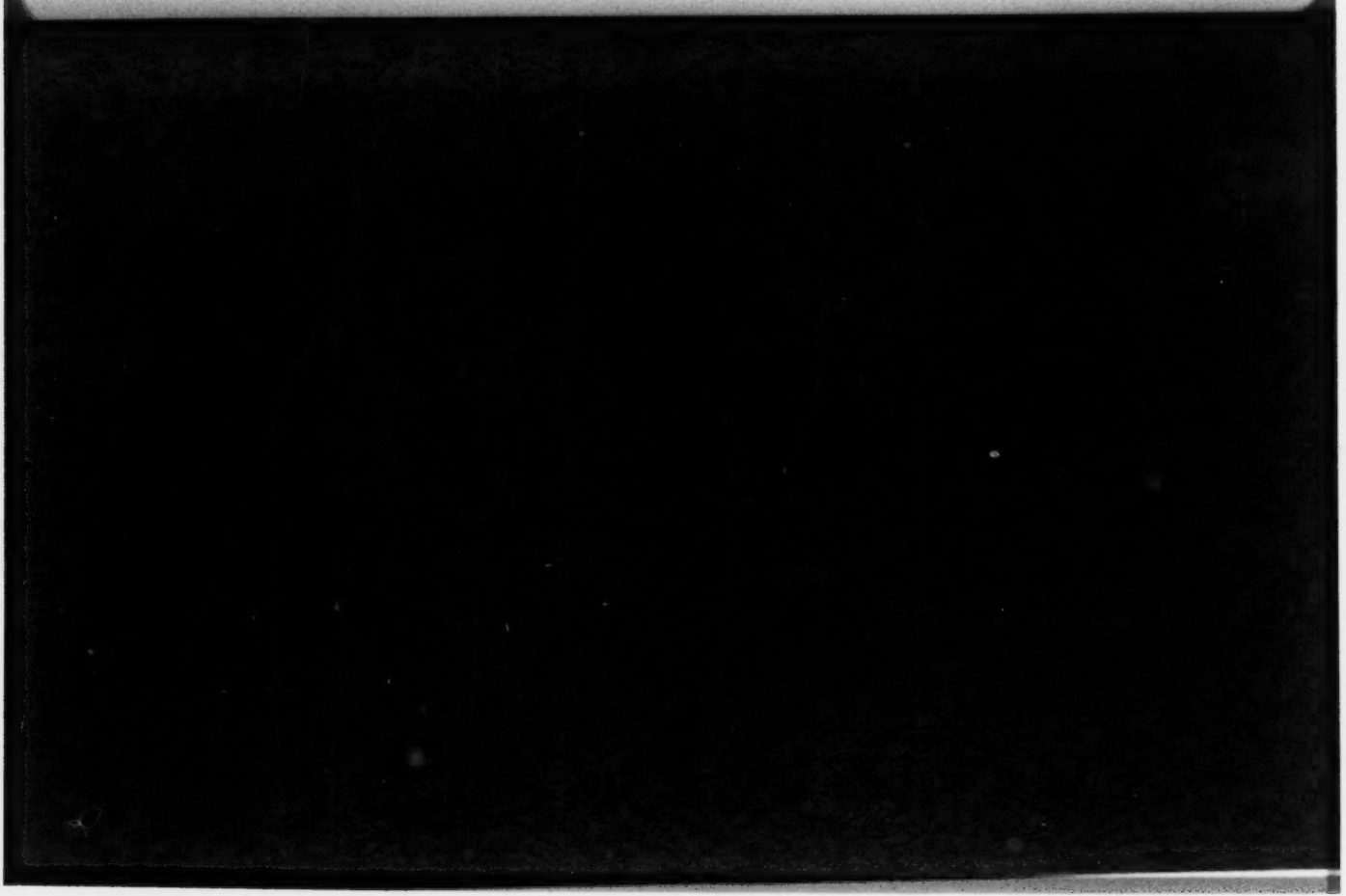

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 229

THE OLD MONASTERY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 96–103) is reported at 147 F. (2d) 905. The opinion of the district court overruling petitioner's demurrer and motion to quash the indictment (R. 11–27) is reported *sub nom. United States* v. *Renken* at 55 F. Supp. 1.[1]

JURISDICTION

The judgment of the circuit court of appeals was entered February 13, 1945 (R. 103), and a petition for rehearing (R. 105–109) was denied

[1] This opinion involved petitioner's case and three related cases. The portion dealing with petitioner's objections to the indictment appears at pages 17–27 of the record.

June 12, 1945 (R. 110). The petition for a writ of certiorari was filed July 14, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment, which charged petitioner and others with conspiracy to violate maximum price regulations, is sufficient to support petitioner's conviction.

2. Whether, assuming that the trial court had jurisdiction to determine petitioner's contention that the price regulations involved are constitutionally invalid, there is any merit in such contention.

3. Whether the conspiracy prosecution was barred because commission of the substantive offense entailed cooperative action.

4. Whether petitioner as a corporation could be guilty as a conspirator, even though the evidence did not show that it either received or was to receive any benefit from the conspiracy charged.

STATUTORY AND OTHER PROVISIONS INVOLVED

The pertinent statutory provisions involved are set forth in the Appendix, pp. 13–16. The maximum price regulations involved are printed in the Federal Register, 7 F. R. 6006–6007; 8 F. R. 11161–11174.

STATEMENT

A single count indictment was returned against petitioner, Walter A. Renken, R. Harold Ostrow, petitioner's president, and Joseph N. Davis, in the United States District Court for the Western District of South Carolina, charging them with conspiracy to violate Section 4 (a) of the Emergency Price Control Act of 1942 and Maximum Price Regulations 193 and 445 promulgated under the Act, in that they would buy, sell, and deliver packaged distilled spirits at prices in excess of those permitted by the regulations. Seven overt acts in furtherance of the conspiracy were alleged. (R. 1–4.) Petitioner and Ostrow filed a demurrer and motion to quash the indictment, in which it was contended, *inter alia,* that under the Twenty-first Amendment of the Constitution, repealing the Eighteenth Amendment, Congress has no power to regulate the price of intoxicating liquors, and that the indictment was insufficient in several other respects (R. 7–11). The district court overruled the demurrer and motion to quash (R. 11–27), and on October 9, 1944, petitioner pleaded not guilty, and defendant Ostrow pleaded *nolo contendere* (R. 4–5).[2] After a trial by jury petitioner was convicted, and it was sentenced on October 18, 1944, to pay a fine of $10,000 (R. 5, 77–78). On appeal to the Circuit Court of Ap-

[2] Davis also pleaded *nolo contendere;* the indictment was dismissed as to Renken (see R. 97) because of the pendency of other indictments.

peals for the Fourth Circuit, the judgment of conviction was affirmed (R. 96–103).[2]

ARGUMENT

1. Petitioner contends (Pet. 4, 9–12) that the indictment is insufficient for the reason that it failed to allege any facts showing the plan and scheme by means of which the conspiracy was to be consummated. We submit that the contention is without merit.

The indictment (R. 1–4), in the language of the conspiracy statute (Appendix, p. 13), alleged that the defendants (1) unlawfully conspired (2) to commit certain specified offenses against the United States, in that they would buy, sell, and deliver packaged distilled spirits at prices in excess of the maximum prices authorized by the applicable price regulations promulgated pursuant to the Emergency Price Control Act of 1942, and (3) that the defendants performed various specified acts in furtherance of the conspiracy. This was plainly adequate.

It is well settled that an indictment charging a conspiracy to violate a criminal statute is sufficient if it alleges the conspiracy in the language of Section 37 of the Criminal Code and contains such a description of the object of the conspiracy as

[2] The questions presented by the petition do not require a delineation of the evidence adduced at the trial. Such of the evidence as is necessary for a consideration of those questions is summarized in the opinion of the court below (R. 102–103), and is set forth in the Argument.

fairly and reasonably informs the defendants of the character of the offense charged. *Culp* v. *United States,* 131 F. (2d) 93, 99 (C. C. A. 8); *Miller* v. *United States,* 125 F. (2d) 517, 518 (C. C. A. 6), certiorari denied, 316 U. S. 687; *Pullin* v. *United States,* 104 F. (2d) 57 (C. C. A. 5), certiorari denied, 308 U. S. 552; *Beland* v. *United States,* 100 F. (2d) 289 (C. C. A. 5), certiorari denied, 306 U. S. 636; *Center* v. *United States,* 96 F. (2d) 127 (C. C. A. 4); *Hill* v. *United States,* 42 F. (2d) 812 (C. C. A. 4), certiorari denied, 282 U. S. 884; *Jelke* v. *United States,* 255 Fed. 264, 275 (C. C. A. 7); *United States* v. *White,* 171 Fed. 775 (C. C. S. D. N. Y.). The details of the plan whereby the law is to be violated need not be set forth, and the charge that the defendants conspired to commit the forbidden acts necessarily imports an unlawful motive. *Pierce* v. *United States,* 252 U. S. 239, 243–244; *Haynes* v. *United States,* 4 F. (2d) 889 (C. C. A. 2), certiorari denied, 268 U. S. 703. Measured by these standards it is clear that the indictment was sufficient.[4]

2. Petitioner contends that the District Court in ruling, on its demurrer, that it lacked juris-

[4] That the acts of buying, selling, or delivering packaged distilled spirits may in themselves be lawful, as pointed out by petitioner (Pet. 12), is obviously without significance, since the indictment charged that the defendants conspired to do these acts in an unlawful manner, i. e., that they would buy, sell, and deliver liquor at prices greater than those permitted by the Act and the regulations.

diction under the decision of this Court in *Yakus* v. *United States,* 321 U. S. 414, to pass upon petitioner's contention that the Twenty-first Amendment barred Congress from establishing maximum prices for sales of intoxicating liquor, was in error because this Court's decision left open the question whether a regulation unconstitutional on its face could be attacked in a criminal prosecution for violation of the regulation and because the *Yakus* case was not a prosecution for conspiracy but for a substantive violation. Petitioner also urges that the Circuit Court of Appeals improperly held that under the amendment of June 30, 1944, adding subsection (e) to Section 204 of the Emergency Price Control Act (Appendix, pp. 14–16), which amendment had become effective at the time of the judgment of the District Court, petitioner's remedy was to attack the regulation's validity in the Emergency Court of Appeals and that its holding is in conflict with the subsequent decision in the Emergency Court of Appeals in *Taub* v. *Bowles,* now pending in this Court on petition for certiorari (No. 195), deciding that the amendment was not applicable to conspiracy prosecutions but only to prosecutions for substantive violations (Pet. 4–5, 6, 13–14). In the Government's brief in opposition in the *Taub* case it is contended that there is no conflict between the two decisions which calls for resolution (Br. 9), particularly in view of the modifica-

tion of Section 204 (e) on June 30, 1945 (Appendix, pp. 14–16), subsequent to both decisions, which permits Emergency Court of Appeals' consideration of a regulation's validity where a conspiracy prosecution is involved, thus rendering no longer of general importance the jurisdictional question which petitioner presents (pp. 8–9, 10).[5] In any event the merits of petitioner's contention based upon the Twenty-first Amendment was passed upon by the Circuit Court of Appeals and is clearly without substance, as is apparent from that decision and the decisions of the Emergency Court of Appeals in the *Taub* case and of the Circuit Court of Appeals for the Sixth Circuit in *Jatros* v. *Bowles*, 143 F. (2d) 453.[6] There is no decision to the contrary.

3. Petitioner next contends (Pet. 5, 15–16) that "the conspiracy here charged required participation in the consummated substantive offense of the same participants and hence the conviction for conspiracy to commit the identical substantive offense is erroneous." It is true that where it is impossible to commit a substantive offense without the

[5] It should be noted, additionally, that in the present case, unlike the *Taub* case, petitioner did not seek leave in the District Court after judgment of conviction to challenge the validity of the regulation in the Emergency Court of Appeals. Consequently, the court below, for this reason alone, was not required to determine the availability of a remedy in the Emergency Court of Appeals.

[6] See also the Government's brief in opposition in the *Taub* case, No. 195, p. 10.

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mutual cooperation of two or more persons, an agreement between the same parties to commit the offense is not an indictable conspiracy. See *Gebardi* v. *United States,* 287 U. S. 112, 122; *United States* v. *Katz,* 271 U. S. 354, 355; *United States* v. *Zeuli,* 137 F. (2d) 845, 846 (C. C. A. 2); *United States* v. *Sager,* 49 F. (2d) 725, 727 (C. C. A. 2); *Norris* v. *United States,* 34 F. (2d) 839, 841 (C. C. A. 3), reversed on other grounds, 281 U. S. 619; *United States* v. *N. Y. C. & H. R. R. Co.,* 146 Fed. 298, 303 (C. C. S. D. N. Y.); *United States* v. *Dietrich,* 126 Fed. 664, 667 (C. C. D. Neb.). But, as pointed out by the court below, "this principle is to be confined to very narrow limits" (R. 100). Thus, as indicated in *Gebardi* v. *United States, supra,* at p. 122, footnote 6, it has been held inapplicable where the substantive crime could be committed by a single individual (*Lisansky* v. *United States,* 31 F. (2d) 846 (C. C. A. 4), certiorari denied, 279 U. S. 873; *Laughter* v. *United States,* 259 Fed. 94, 97–98 (C. C. A. 6); *Chadwick* v. *United States,* 141 Fed. 225, 237 (C. C. A. 6)), and also where the conspiracy contemplated the cooperation of a greater number of parties than were necessary to the commission of the principal offense. *McKnight* v. *United States,* 252 Fed. 687, 689 (C. C. A. 8); *Thomas* v. *United States,* 156 Fed. 897, 905 (C. C. A. 8); cf. *Ex parte O'Leary,* 53 F. (2d) 956, 958 (C. C. A. 7); *Vannata* v. *United States,* 289 Fed. 424, 428 (C. C. A. 2).

Applying these considerations to the present case, we think the circuit court of appeals properly held that petitioner's contention is without merit for the reason that the conspiracy "embraces not merely the necessary parties to the illegal sale, the seller and the buyer, but other conspirators as well" (R. 100–101). The indictment named as conspirators petitioner, Ostrow, petitioner's president, Renken, and Davis (R. 1). Petitioner sold the liquor to Renken (R. 43–45). Davis, a salesman for a wine dealer not involved in the case, originated the scheme. He ascertained from Ostrow that petitioner would sell whiskey at prices in excess of those permitted by the maximum price regulations, and procured Renken, a wholesale dealer, to buy the whiskey from petitioner for resale to retailers who were also procured by Davis (R. 29–32).[7]

4. Finally, petitioner contends (Pet. 5, 16–19) that, since it is a corporation, the evidence was insufficient to establish its guilt of conspiracy, because such evidence did not show that it either received or was to receive any benefit from the conspiracy. Assuming that petitioner's appraisal of the evidence is justified (cf., however, R. 73–75),

[7] By the same token there is no merit in petitioner's further argument (Pet. 16) that the provision of Section 4 (a) of the Emergency Price Control Act (Appendix, p. 13), making it unlawful to agree to sell or buy any commodity in violation of any price regulation, precluded this prosecution for conspiracy under Section 37 of the Criminal Code.

we submit that the Circuit Court of Appeals properly held that benefit is not "a touchstone of corporate criminal liability; benefit, at best, is an evidential, not an operative, fact." (R. 101.)

It is plain, of course, that a corporation is criminally liable for participating in an illegal conspiracy. *Joplin Mercantile Co.* v. *United States,* 213 Fed. 926, 935–936 (C. C. A. 8), affirmed, 236 U. S. 531; *United States* v. *MacAndrews & Forbes Co.,* 149 Fed. 823, 835–836 (C. C. S. D. N. Y.). Since the statute punishes those who "conspire * * * to commit any offense against the United States," it is of no consequence that the conspirators may not expect to reap any pecuniary advantage from the conspiracy. Cf. *United States* v. *Bradford,* 148 Fed. 413, 422 (C. C. E. D. La.); *United States* v. *Newton,* 52 Fed. 275, 281 (S. D. Ia.); see also *Direct Sales Co.* v. *United States,* 319 U. S. 703, 713. And, of course, the fact that the conspirators do not receive any material benefit from the conspiracy is immaterial because the conspiracy is punishable whether or not its illegal objective is accomplished. *Goldman* v. *United States,* 245 U. S. 474, 477; *United States* v. *Rabinowich,* 238 U. S. 78, 86; *Williamson* v. *United States,* 207 U. S. 425, 447. Nor is there any reason for deviating from these principles in the case of a corporate defendant.[8] As

[8] Petitioner's reliance on *New York Central R. R.* v. *United States,* 212 U. S. 481, is misplaced. The Court in that case decided that a corporation is criminally responsible for

was properly held by the court below (R. 101–103), the guilt of petitioner depended upon whether the acts of Ostrow, its president, were his own individual acts or were undertaken in his capacity as an officer and representative of petitioner and were within the scope of his authority. The evidence, which is summarized in the opinion of the circuit court of appeals (R. 102–103), is undoubtedly sufficient to support the finding of the jury in this respect, and petitioner does not claim otherwise.

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illegal acts done by an authorized corporate agent in exercising the authority conferred upon him, as against the contention that a corporation owing to its nature could not commit the crime charged. The Court did not hold, as asserted by petitioner, that the basis of liability is that the corporation must benefit from the illegal acts. It observed that "We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act * * * and whose knowledge and purposes may well be attributed to the corporation for which the agents act * * * and to give them [corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at" (212 U. S. at 495–496). See also *State* v. *Salisbury Ice and Fuel Co.*, 166 N. C. 366, 369 (1914). To require, as a condition precedent for criminal corporate liability, that the corporation must profit by the crime, is manifestly a proposition without support in reason or policy.

CONCLUSION

The contentions urged in the petition for a writ of certiorari do not warrant further review by this Court. We therefore respectfully submit that the petition should be denied.

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AUGUST 1945.